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9 **UNITED STATES BANKRUPTCY COURT**

10 **DISTRICT OF NEVADA**

11 In re: MELANI SCHULTE and
WILLIAM SCHULTE,

12
13 2704 SATTLEY LLC,
HOT ENDEAVOR LLC,
14 1341 MINUET LLC,
1708 PLATO PICO LLC,
15 2228 WARM WALNUT LLC,
9425 VALLEY HILLS LLC,
16 9500 ASPEN GLOW LLC,
5218 MISTY MORNING LLC,
17 CHERISH LLC,
SABRECO Inc.,
18 KEEP SAFE LLC

Case No.: 09-29123-MKN

Chapter 11

Jointly Administered with:

09-27238-BAM
09-27909-BAM
09-27910-BAM
09-27911-BAM
09-27912-BAM
09-27913-BAM
09-27914-BAM
09-27916-BAM
09-28513-BAM
09-31584-BAM
09-31585-BAM

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24 **CITIMORTGAGE, INC.'S RESPONSE
TO DEBTOR'S AMENDED MOTION
FOR CONTEMPT FOR VIOLATION
OF THE AUTOMATIC STAY AND
DISCHARGE INJUNCTION, FAILING
TO COMPLY WTH COURT ORDER
AND THE CONFIRMED PLAN AND
FOR DAMAGES INCLUDING
ATTORNEYS FEES AGAINST
CREDITOR, CITIMORTGAGE INC.
[DKT No. 1283, 1289]**

25 **Hearing:**

26 Date: November 18, 2020

Time: 9:30 a.m.

Judge: Hon. Mike K. Nakagawa

1 CitiMortgage, Inc. (“Citi”) hereby files its *Response to Debtor’s Amended Motion for*
2 *Contempt for Violation of the Automatic Stay and Discharge Injunction and Failure to Comply with*
3 *a Court Order and the Confirmed Plan and for Damages* (“Motion for Contempt”) [Dockets 1283,
4 1289], Declaration of CitiMortgage, Inc. (“Citi Declaration”), Declaration of Cenlar FSB (“Cenlar
5 Declaration”), and related Exhibits (“Exhibits”) in Support of its Response (collectively, the
6 “Response”).

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1 **I. INTRODUCTION**

2 On October 11, 2009, William R. Schulte and Melani Schulte (the “Borrower” or “Debtor”)
 3 filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code, Case No. 09-29123-
 4 MKN (the “First Case”). On March 8, 2011, the Court entered an Order Confirming a Plan in the
 5 First Bankruptcy Case (the “Confirmation Order” or (“Confirmed Plan”). The Confirmation Order
 6 effectively modified secured claims encumbering the Debtor’s thirty-two (32) rental properties,
 7 including the Subject Loan previously serviced by Citi.

8 Following entry of the Confirmation Order in the First Case, it is uncontested the Debtor
 9 defaulted under the terms of the Confirmed Plan by failing to make the required monthly mortgage
 10 payments and escrow payments to Citi. At the same time, Debtor alleged many creditors failed to
 11 comply with the Confirmation Order by correctly updating records to reflect the modification of
 12 claims in the Confirmed Plan. Citi is currently in compliance with the Confirmation Order from the
 13 First Case. Subsequently, the Debtor filed two additional bankruptcy cases under the name of her
 14 controlled entity, Schulte Properties, LLC (“SPLLC”). Meanwhile Citi transferred sub-servicing of
 15 the Subject Loan to Cenlar FSB (“Cenlar”) in April 2019.

16 The ongoing dispute between the Parties has encompassed three (3) bankruptcy cases
 17 spanning a decade and multiple service transfers of the Debtor’s loan(s) over ten (10) years. As a
 18 result, Citi requested the Debtor’s participation in the Court’s Judicial Settlement Conference and
 19 the Court entered an [Amended] Order Scheduling Settlement Conference (“Amended Settlement
 20 Order”). (*See* Third Case, Dkt No. 734). The Judicial Settlement Conference is scheduled for
 21 October 6, 2020, in the Third Case.

22 Notwithstanding the Court ordering the Parties to participate in the Judicial Settlement
 23 Conference, on September 4, 2020, Debtor filed the instant Motion for Contempt against Citi related
 24 to the Subject Loan in First Case. In the Motion for Contempt, Debtor alleges Citi failed to comply
 25 with the Confirmation Order in the First Case, violated the Discharge Order, and violated the
 26 automatic stay. Due to the alleged violations, Debtor seeks actual [unspecified] damages against
 27 Citi, including emotional distress damages under §§105, 362(k), and 524. Further, Debtor requested
 28

1 punitive damages, sanctions, and an award of attorneys' fees and costs incurred, with amounts to
2 be determined at a hearing.

3 First, Citi asserts the Motion for Contempt should be stayed until the Parties exhaust all
4 mitigation options at the court-ordered Judicial Settlement Conference. Citi is prepared to
5 participate in the Judicial Settlement Conference in good faith. Citi, and the approximately eight
6 (8) other creditors participating in the Judicial Settlement Conference, seek a global resolution of
7 all issues and claims related to the First Case, including any claims asserted by the Debtor in the
8 Motion for Contempt. Accordingly, the Court should continue any proceedings on the Motion for
9 Contempt until the conclusion of the Judicial Settlement Conference in the Third Case.

10 Second, Citi asserts it is currently in compliance with the Confirmation Order from the First
11 Case. While the Debtor submitted monthly informational statements from years ago in an attempt
12 to demonstrate Citi's non-compliance with the Confirmed Plan, Debtor failed to submit any recent
13 statements, which clearly show Citi's compliance (and the Debtor's default). As Citi is in
14 compliance with the Confirmation Order it is no longer necessary or appropriate to hold Citi in
15 contempt to force compliance with the terms of a court order under §§ 105(a) or 524.

16 Third, Citi asserts the automatic stay terminated upon entry of the Confirmation Order in
17 2011 or, at the latest, upon entry of the Discharge Order in 2015. There is currently no automatic
18 stay in effect to support a claim for an ongoing stay violation. Additionally, Debtor attempts to
19 classify herself with Chapter 7 debtors who receive a discharge and there is no expectation of
20 receiving communications/correspondence creditors. Debtor and Citi have an ongoing contractual
21 relationship based on the terms of her Confirmed Plan. A contract she immediately breached when
22 failing to make payments on the modified loan. As such, Citi believed it was reasonable for it to
23 provide Debtor information regarding the status of the Subject Loan and ascertain whether Debtor
24 needed loss mitigation assistance based on her default under the terms of the confirmed Chapter 11
25 Plan. Additionally, based on the terms of the Debtor's Chapter 11 Plan, Citi it was objectively
26 reasonable for Citi to believe the automatic stay terminated upon entry of the Confirmation Order
27 and/or Discharge Order.

28

1 Fourth, Citi did not act in bad faith or with willful misconduct to warrant sanctions under §
2 105(a) or punitive damages. To the contrary, Citi has acted in good faith to resolve this matter, most
3 recently, through the Judicial Settlement Conference. However, the Debtor has acted in bad faith
4 by continuing to collect rent from the Property for years without making payments on the Loan.

5 Fifth, Citi asserts any statements sent to the Debtor were: (i) for informational purposes only
6 based on the Debtor's default under the Confirmed Plan, (ii) not sent with an intention to collect a
7 debt from the Debtor personally, but rather to enforce it in rem rights to the Property based on the
8 Debtor's default under the Confirmed Plan (iii) sent to assist the Debtor with potential loss
9 mitigation based on Debtor's default under the Confirmed Plan; and (iv), were objectively
10 reasonably given the Debtor's default under the Confirmed Plan.

Finally, even assuming *arguendo* Debtor could satisfy the elements for a willful violation of the discharge injunction under § 524, stay violation under § 362, or that the Court finds Citi in contempt under § 105(a), Debtor has failed to establish she is entitled to any damages. Indeed, the Debtor has successfully moved the Property, and approximately 30 other properties, in and out of bankruptcies while transferring the properties to shell entities for the benefit of the automatic stay and in furtherance of her scheme to collect rents while failing make to payments on the loans. The Debtor has pocketed hundreds of thousands of dollars over the last ten years without making payments on the loans secured by her properties. For Debtor to now seek redress from the Court as an individual, while seeking to also obtain relief via an LLC in the Third Case, all with soaking unclean hands over the last ten years is disingenuous at best and in bad faith at worst.

II. STATEMENT OF FACTS

A. LOAN HISTORY

On March 5, 1993, Edward Wendell Porta and Patricia Porta executed a promissory note in the principal sum of \$126,056.00 (the “Note”). The Note reflects it was specially indorsed to Citi. Subsequently, William Schulte and Melani Schulte executed an Assumption Agreement Creating Liability to the Holder of the Note. (See Exhibit A, Declaration of CitiMortgage, Inc. (“Citi Declaration”); ¶4).

1 The Note is secured by a deed of trust (the “Deed of Trust”) encumbering the real property
 2 located at 9500 Aspen Glow Drive, Las Vegas, NV 89134 (“Property”). (*See Exhibit A, Citi*
 3 *Declaration, ¶4*). The Note and Deed of Trust are correctly referenced as the “Subject Loan.”

4 The Deed of Trust was assigned to Citi. (*See Exhibit A, Citi Declaration, ¶4*).

5 On April 1, 2019, Citi transferred sub-servicing of the Subject Loan to Cenlar, FSB
 6 (“Cenlar”). (*See Exhibit A, Citi Declaration, ¶7 and Exhibit B, Declaration of Cenlar FSB (“Cenlar*
 7 *Declaration”), ¶1*).

8 **B. THE FIRST BANKRUPTCY CASE**

9 On October 11, 2009, Debtor filed the First Case as Case No. 09-29123.

10 On March 18, 2011, the Court entered a *Stipulated Order Regarding the Treatment of*
 11 *Creditor’s Claim* (“Stipulation” and “Order”) in the First Case. (*See First Case, Dkt No 917, 925*).
 12 The Stipulation provided Citi with a secured claim of \$94,646.23 amortized over thirty (30) years
 13 at 5.25% interest per annum. Principal and Interest Payments of \$522.64 were to commence March
 14 1, 2011 and continue each month thereafter. Further, the Stipulation provided the Loan shall remain
 15 escrowed, with the Debtor responsible for making monthly escrow payments to Citi for taxes and
 16 insurance. (*See Exhibit C, Stipulation*).

17 On March 8, 2011, the Court entered the Confirmation Order in the First Case, which
 18 modified the Subject Loan as outlined in the Stipulation. (*See First Case, Dkt No 912*).

19 On December 15, 2015, Debtor obtained a Chapter 11 discharge in the First Case. (*See First*
 20 *Case, Dkt No 1181-2*).

21 Citi verified completion of system updates to reflect the terms of the Confirmed Plan. Citi
 22 is currently in compliance with the Confirmation Order from the First Case. (*See Exhibit A, Citi*
 23 *Declaration, ¶5, Exhibit B, Cenlar Declaration, ¶5*).

24 The monthly statements (“Cenlar Statements”) sent to the Debtor for the past twelve (12)
 25 months reflect the terms of the Confirmed Plan, including the correct interest rate (5.25%) and
 26 Principal and Interest Payment amount (\$522.64). (*See Exhibit D, Cenlar Statements, Exhibit B,*
 27 *Cenlar Declaration, ¶6*).

28

1 The Subject Loan reflects a default based on the Debtor's failure to make all required
 2 Principal, Interest, and Escrow Payments under the Confirmed Plan. (*See* Exhibit B, Cenlar
 3 Declaration, ¶7).

4 As of October 6, 2020, the approximate payoff owed on the Subject Loan totals
 5 \$122,434.33. As of October 6, 2020, the approximate contractual reinstatement on the Subject Loan
 6 totals \$57,584.57. (*See* Exhibit B, Cenlar Declaration, ¶8).

7 **C. THE SECOND BANKRUPTCY CASE**

8 Thereafter, Debtor allegedly transferred her interest in the Property to Schulte Properties,
 9 LLC.

10 Five (5) days after registering the entity with the Nevada Secretary of State, on May 31,
 11 2017, SPLLC, filed a second Chapter 11 Bankruptcy Case and was assigned case number 17-12883
 12 (the “Second Case”). Debtor, Melani Schulte signed the petition as Managing Member of the
 13 SPLLC. (*See* Second Case, Dkt. No. 1).

14 SPLLC failed to confirm a Chapter 11 Plan in the Second Case. On January 16, 2018, the
 15 Court entered an Order Dismissing the Second Case. (*See* Second Case, Dkt. No. 99).

16 **D. THE THIRD BANKRUPTCY CASE**

17 Several months later, on May 10, 2018, SPLLC commenced a third Bankruptcy Case by
 18 filing a third voluntary petition under Chapter 11 of the Bankruptcy Code and was assigned case
 19 number 18-12734-mkn (the “Third Case”). Debtor, Melani Schulte signed the petition as Managing
 20 Member of SPLLC. (Dkt No. 1).

21 On January 30, 2019, Citi filed *its Amended Proof of Claim* reflecting a secured claim of
 22 \$135,449.71, including *pre-petition* arrears of \$50,926.11 (the “Claim”). (*See* Exhibit E, Third
 23 Case, Claim No. 17-2). The Proof of Claim indicates Citi updated its system to reflect the treatment
 24 of its Claim in the Plan from the First Case. (*See* Exhibit A, Citi Declaration, ¶5-6).

25 On April 7, 2020, Citi met and conferred with Debtor’s counsel regarding the possibility of
 26 a global settlement of all claims, including mutual participation in the court’s judicial settlement
 27 program.

28

On September 16, 2020, the Court entered an [Amended] Order Scheduling Settlement Conference (“Amended Settlement Order”). (Dkt No. 734). The Judicial Settlement Conference is scheduled for October 6, 2020.

E. THE MOTION FOR CONTEMPT

After the Court entered the First Settlement Order, Debtor filed the Motion for Contempt against Citi in her First Case (First Case, Dkt No. 1283, 1289). Debtor alleges Citi failed to comply with the Confirmation Order in the First Case, violated the Discharge Order, and violated the automatic stay. The Motion for Contempt is supported solely with informational statements allegedly sent by Citi to the Debtor following entry of the Confirmation Order. Due to the alleged violations, Debtor seeks actual [unspecified] damages against Citi, including emotional distress damages under §§105, 362(k), and 524. Further, Debtor requested punitive damages, sanctions, and an award of attorneys' fees and costs incurred, with amounts to be determined. In support of the allegations, Debtor attached copies of informational statements allegedly received from Citi following entry of the Confirmation Order in the First Case.

III. ARGUMENT

A. CITI SHOULD NOT BE HELD IN CONTEMPT UNDER 11 U.S.C. § 105 AS IT IS IN COMPLIANCE WITH THE CONFIRMATION ORDER AND DISCHARGE ORDER

1. Legal Standard

A party injured by a violation of a discharge injunction has no private cause of action for damages under § 524 or § 105. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 207 (9th Cir. 2002). Rather, a violation under § 524(a) is enforced through the bankruptcy court's contempt authority under §105(a). *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002).

The court's contempt authority under §105(a) is only a civil contempt authority and allows only for civil sanctions as the appropriate remedy. Pursuant to 11 U.S.C. § 105, the court is empowered with discretion to take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. 11 U.S.C. § 105(a). Section 105(a) authorizes ***only*** such remedies as are ***necessary and appropriate*** to carry out the provisions of Bankruptcy Code. See *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 207 (9th Cir.

1 2002) (emphasis added). In a civil contempt proceeding, the moving party has the burden of
 2 showing by clear and convincing evidence that the contemnors violated a specific and definite order
 3 of the court. *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002). However, civil penalties must
 4 either be compensatory or designed to coerce compliance. *F.J. Hanshaw Enters., Inc. v. Emerald*
 5 *River Dev., Inc.*, 244 F.3d 1128, 1137-38 (9th Cir. 2001). Indeed the power of the bankruptcy court
 6 to condemn should be exercised sparingly so long as justice can be done. *In re Mallow Hotel Corp.*,
 7 18 F.Supp. 869 (M.D. Pa. 1937).

8 **2. Citi is in Compliance with the Confirmation Order and Discharge Order:**

9 The language of § 105(a) authorizes *only* those remedies *necessary* to enforce the
 10 Bankruptcy Code. *Walls*, 276 F.3d at 507 (emphasis added). As discussed above, Citi updated its
 11 system to reflect the modification of its claim in the First Plan. Citi did not intentionally violate the
 12 terms of the Confirmation Order or Discharge Order as asserted by the Debtor. Indeed, Citi believed
 13 it was in compliance with the First Plan.

14 After the filing of the Third Case, wherein the Debtor made blanket allegations of creditor
 15 non-compliance with the Confirmed Plan from the First Case, Citi audited the Subject Loan to
 16 verify completion of system updates to reflect the terms of the Confirmed Plan. Citi is currently in
 17 compliance with the Confirmation Order from the First Case. (*See Exhibit A, Citi Declaration, ¶5*).
 18 The monthly statements sent to the Debtor for the past twelve (12) months reflect the terms of the
 19 Confirmed Plan, including the correct interest rate (5.25%) and Principal and Interest Payment
 20 amount (\$522.64). (*See Exhibit B, Cenlar Declaration, ¶6 and Exhibit D, Cenlar Statements*).
 21 Further, Citi filed its Amended Proof of Claim in the Third Case reflecting a secured claim of
 22 \$135,449.71, including *pre-petition* arrears of \$50,926.11. (*See Exhibit E, Claim 17-2*). The Proof
 23 of Claim indicates Citi updated its system to reflect the treatment of its Claim in the Plan from the
 24 First Case. Specifically, the Claim reflected a secured claim of \$94,646.23 amortized over thirty
 25 (30) years at 5.25% interest per annum with Principal and Interest Payments of \$522.64 plus escrow
 26 payments for taxes and insurance. (*See Exhibit E, Claim 17-2*).

27 The Subject Loan reflects a default as *the Debtor* failed to comply with the Confirmed Plan
 28 by making all Principal, Interest, and Escrow Payments to Citi. (*See Exhibit A, Citi Declaration, ¶6*

1 and Exhibit B, Cenlar Declaration, ¶7). As of October 6, 2020, the approximate payoff owed on the
 2 Subject Loan totals \$122,434.33. As of October 6, 2020, the approximate contractual reinstatement
 3 on the Subject Loan totals \$57,584.57. (See Exhibit B, Cenlar Declaration, ¶8).

4 While Citi submitted evidence to demonstrate its compliance with the Confirmed Plan (and
 5 the Debtor's default), Debtor failed to submit evidence to suggest Citi is currently in violation of
 6 the Confirmation Order (or any other court order). Nor has the Debtor objected to Citi's Proof of
 7 Claim in the Third Case. Cherry-picking informational statements from nine years ago to show non-
 8 compliance now is unreasonable and unproductive. Moreover, even assuming arguendo Debtor can
 9 establish Citi *previously* sent informational statements with outdated figures following entry of the
 10 Confirmation Order, Debtor cannot establish Citi is *currently* in violation of a court order, or that
 11 she suffered damages as a result of alleged non-compliance. Indeed, the Debtor has continued to
 12 receive the benefit of collecting rent over ten years without making payments on the Loan.
 13 Additionally, in violation of the Confirmed Plan, the Debtor has failed to maintain insurance on the
 14 Subject Property or pay the taxes due regarding the Subject Property. As such, Citi has been forced
 15 to insure the Subject Property against loss and pay the taxes to protect its priority interest in the
 16 Subject Property. All this while the Debtor pockets rent, makes incomplete payments, and remains
 17 in violation of the Confirmed Plan by failing to pay taxes and insurance.

18 Citi did not intentionally violate the terms of the Confirmed Plan or Discharge Order as
 19 asserted in the Debtor's Motion for Contempt. While Debtor may assert Citi failed to *immediately*
 20 update its system to reflect the modification of the Subject Loan from First Case, Citi has in fact
 21 updated its system to reflect the modification of the Subject Loan. The Confirmation Order clearly
 22 did not include a deadline for creditors to update their systems to reflect the new terms. Regardless,
 23 Citi has updated its system to reflect the modification of the Subject Loan. Thus, Citi is currently
 24 in compliance with the terms of the Confirmed Plan and Discharge Order. As such, it is not
 25 necessary or appropriate to hold Citi in contempt to force compliance with the terms of a court order
 26 under § 105(a). Accordingly, the Debtors' Motion for Contempt must be denied.

27 **B. CITI DID NOT VIOLATE THE AUTOMATIC STAY**

28 **1. Legal Standard**

1 11 U.S.C. §362(c) provides:

- 2 (1) the stay of an act against property of the estate under subsection (a) of
 3 this section continues until such property is no longer property of the
 4 estate;
- 5 (2) the stay of any other act under subsection (a) of this section continues
 6 until the earliest of—
 7 (A) the time the case is closed;
 8 (B) the time the case is dismissed; or
 9 (C) if the case is a case under chapter 7 of this title concerning an
 10 individual or a case under chapter 9, 11, 12, or 13 of this title, the
 11 time a discharge is granted or denied.

12 11 U.S.C. §362(c). Pursuant to § 362(c)(1), the stay of an act against property of the estate continues
 13 only until such property is no longer property of the estate. 11 U.S.C. §362(c)(1). The automatic
 14 stay terminates upon confirmation pursuant to 11 U.S.C. §362(c)(1) as a Chapter 11 Plan typically
 15 revests property of the estate with the debtor. *In re Houlik*, 481 B.R. 661, 673 (10th Cir. BAP 2012).

16 **2. The Automatic Stay Terminated Upon Entry of the Confirmation Order**

17 Debtor alleges Citi violated the automatic stay of §362(a) by sending inaccurate
 18 informational statements following entry of the Confirmation Order and Discharge Order. As a
 19 result, Debtor alleges she is entitled to damages under §362(k) based on a willful and ongoing stay
 20 violation. However, Debtor's Confirmed Plan expressly provided “[a]fter confirmation of the Plan,
 21 all property of the Debtors shall vest in the reorganized Debtors and the Holding Company.” (*See*
 22 *Plan*, §6.05). As a result, the automatic stay terminated upon confirmation of the Plan on March 8,
 23 2011. 11 U.S.C. §362(c)(1). Further, even assuming arguendo the Court concludes the automatic
 24 stay did not terminate upon entry of the Confirmation Order on March 8, 2011, the automatic stay
 25 terminated, at the latest, upon entry of the Discharge Order on December 15, 2015. 11 U.S.C.
 26 §362(c)(2)(C). As a result, there is no stay violation to support a claim for damages under §362(k).

27 Citi did not intentionally or willfully violate the automatic stay. Rather, Citi believed its
 28 actions were objectively reasonable in furtherance of its *in rem* rights and did not violate the stay.
 (See *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019). Citi completed system adjustments following
 entry of a Confirmation Order. As a result, Debtor has failed to establish Citi willfully violated the

1 automatic following entry of the Confirmation Order or that damages are appropriate under §362(k)
 2 for an ongoing stay violation. Accordingly, the Debtor's Motion for Contempt must be denied.

3 **C. SANCTIONS ARE NOT APPROPRIATE UNDER THE COURT'S INHERENT
 4 AUTHORITY AS CITI DID NOT ACT IN BAD FAITH OR WITH WILLFUL
 MISCONDUCT**

5 **1. Legal Standard**

7 In extreme cases, where conduct rises to the level of bad faith, the bankruptcy court may also
 8 impose sanctions under its inherent sanction authority. *In re Rainbow Magazine*, 77 F.3d 278, 284
 9 (9th Cir. 1996). The inherent sanction authority allows a bankruptcy court to deter and provide
 10 compensation for a broad range of improper litigation tactics. *Fink v. Gomez*, 239 F.3d 989, 992-93
 11 (9th Cir. 2001). “The inherent sanction authority differs from the civil contempt authority in an
 12 additional respect as well. Before imposing sanctions under its inherent sanctioning authority, a court
 13 must make an explicit finding of bad faith or willful misconduct . . . [which] consists of something
 14 more egregious than mere negligence or recklessness.” *Id* at 993-94. The Supreme Court in *Roadway
 Express, Inc. v. Piper*, 447 U.S. 752 (1980), delivered the definitive summary of the basis on which
 16 a federal court may levy sanctions under its inherent power. The Court reiterated the federal courts’
 17 inherent power to levy sanctions, including attorneys’ fees, for “willful disobedience of a court order
 18 ... or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive
 19 reasons....” *Id.* at 766. The Court reaffirmed the *Roadway* principles in *Chambers v. NASCO, Inc.*,
 20 501 U.S. 32 (1991), emphasizing the continuing need for resort to the court’s inherent power,
 21 because it is “both broader and narrower than other means of imposing sanctions.” *Id.* at 46. On the
 22 one hand, the inherent power “extends to a full range of litigation abuses.” On the other, the litigant
 23 must have “engaged in bad faith or willful disobedience of a court’s order.” *Id.* at 46-47, 111 S.Ct.
 24 2123. In *Chambers*, the Court left no question that a court may levy fee-based sanctions when a
 25 party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Fink v. Gomez*, 239
 26 F.3d 989, 991-92 (9th Cir. 2001).

27 **2. Citi Did Not Intentionally Violate a Court Order to Warrant Sanctions or Contempt**

1 Debtor failed to demonstrate Citi engaged in clearly frivolous or legally unreasonable
 2 conduct to warrant sanctions. Before imposing sanctions under its inherent sanctioning authority, a
 3 court must make an explicit finding of bad faith or willful misconduct . . . [which] consists of
 4 something more egregious than mere negligence or recklessness.” *Fink*, 239 F.3d at 992-93.

5 As discussed above, Citi completed an audit to verify its compliance with the Confirmation
 6 Order from the First Case. (See Exhibit A, Citi Declaration, ¶5). Citi did not engage in vexatious
 7 conduct, nor did it willfully violate an order of the court to warrant the extreme and extraordinary
 8 remedy of court-ordered sanctions. The Debtor herself does not allege Citi engaged in unreasonable
 9 conduct. Debtor’s entire Motion for Contempt is based on written communications allegedly
 10 remitted by Citi. However, the communications specifically advised they are for informational
 11 purposes, in furtherance of Citi’s secured interest in the Property, and offering Debtor loss
 12 mitigation assistance. The Debtor does not allege she ever contacted Citi and requested Citi no
 13 longer send her any correspondence/communications nor does she allege any Citi took any other
 14 actions allegedly in violation of the automatic stay, discharge injunction, or Plan. Indeed, following
 15 verification of system adjustments to reflect the Confirmed Plan terms, Citi reached out to the
 16 Debtor to resolved the default on account and the treatment of the Claim in the Third Case. Further,
 17 Citi requested the Debtor’s participation in the Court’s Judicial Settlement Conference. Citi is
 18 prepared to participate in the Judicial Settlement Conference in good faith. Citi seeks a global
 19 resolution of all issues and claims related to the First Case, including any claims asserted by the
 20 Debtor in the Motion for Contempt.

21 Therefore, Citi did not act in bad faith or with willful misconduct to warrant sanctions under
 22 § 105(a). Accordingly, the Motion for Contempt must be denied.

23 **D. DEBTOR IS NOT ENTITLED TO DAMAGES FOR VIOLATION OF THE**
DISCHARGE INJUNCTION

24 **1. Legal Standard**

26 A discharge “operates as an injunction against the commencement or continuation of an
 27 action ... to collect, recover or offset any [discharged] debt as a personal liability of the debtor.” 11
 28 U.S.C. § 524(a)(2) (2006). A party that knowingly violates the discharge injunction can be held in

1 contempt under § 105(a). *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir.2002);
 2 *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir.2002). Section 105(a) permits the
 3 bankruptcy court to “issue any order ... that is necessary or appropriate to carry out the provisions
 4 *176 of this title.” An award of damages under section 105(a) is discretionary. *United States v.*
 5 *Arkison (In re Cascade Roads, Inc.)*, 34 F.3d 756, 767 (9th Cir.1994); *In re Pace*, 67 F.3d 187, 193
 6 (9th Cir.1995).

7 The party seeking contempt sanctions for violation of the discharge injunction has the burden
 8 of proving, by clear and convincing evidence, that the sanctions are justified. *Espinosa v. United*
 9 *Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 n. 7 (9th Cir.2008). Enforcement of a lien is not a
 10 violation of the discharge injunction because the discharge injunction by its terms only prohibits
 11 efforts to collect debts “as a personal liability of the debtor.” See 11 U.S.C. § 524. But, “[e]ven if a
 12 creditor threatens only to enforce its surviving lien, that threat will violate the discharge injunction
 13 if the evidence shows that the threat is really an effort to coerce payment of the underlying discharged
 14 debt.” See, e.g., *Marino*, 577 B.R. 772, 784 (emphasis added).

15 Together section 524(a)(2) and 105(a) “authorize a court to impose civil contempt sanctions
 16 [for attempting to collect a discharged debt] where there is no objectively reasonable basis for
 17 concluding the creditor’s conduct might be lawful under the discharge order.” *Taggart v. Lorenzen*,
 18 139 S. Ct. 1795, 1801 (2019). As such, a court may only hold a creditor in civil contempt for
 19 violating a discharge order if there is no fair ground of doubt as to whether the order barred the
 20 creditor’s conduct. *Id.* at 1799. Put differently, if there is “fair ground of doubt” as to whether the
 21 subject order barred the conduct the violator engaged in, the court has the discretion not to hold the
 22 alleged violator in contempt of court. See *Id.* at 1804. Based upon the foregoing, the Debtor must
 23 prove by clear and convincing evidence that Citi’s alleged actions were in violation of the discharge
 24 injunction and there was **no objectively reasonable** basis for Citi to believe it was not in violation
 25 of the discharge injunction.

26 **2. Citi’s Actions were Objectively Reasonable Given the Debtor’s Default under**
 27 **the Confirmed Plan**

28

1 Under *Taggart*, as noted above, a court “may hold a creditor in civil contempt for
 2 violating a discharge order where there is,” on an “objective” basis, “not a ‘fair ground of
 3 doubt’ as to whether the creditor’s conduct might be lawful under the discharge order.”
 4 *Taggart*, 139 S.Ct. 1795, 1804 (emphasis added; citation omitted). “Under the fair ground of doubt
 5 standard,” civil contempt “may be appropriate when the creditor violates
 6 a discharge order based on an objectively unreasonable understanding of the discharge
 7 order or the statutes that govern its scope.” *Id.* at 1802 (emphasis added).

8 First, Debtor does not allege Citi contacted the Debtor directly via telephone in violation of
 9 the discharge injunction. Indeed, Debtor’s entire case against Citi for alleged violation of the
 10 automatic stay and discharge injunction is based solely on the alleged receipt of informational
 11 statements in the mail. Debtor alleged the statements contained inaccurate figures prior to
 12 completion of system adjustments. Additionally, notwithstanding the litany of cases cited by the
 13 Debtor in her Motion for Contempt, this is not a Chapter 7 case where the Debtor has a reasonable
 14 belief she is no longer liable for making payments on the loan following a discharge order, or where
 15 the Debtor should not expect to receive written correspondence from Citi regarding the Loan. As
 16 such, Debtor’s feign outrage for receiving the alleged offending correspondence is disingenuous.

17 Second, each statement allegedly sent to the Debtor included a disclaimer advising the
 18 Debtor the correspondence was for “informational purposes only” and not an attempt to collect the
 19 debt from the Debtor personally, but rather to enforce *in rem* rights against the Property. Debtor has
 20 not met her burden of showing that the informational statements were an unlawful debt collection in
 21 violation of § 524. The monthly statements were not to pressure Debtor to repay a discharged debt.
 22 *In re McLean*, 794 F.3d at 1322. Indeed, the disclaimers were printed in capital letters on bold on
 23 the first page of each statement. The statements declared that: "THIS MORTGAGE ACCOUNT
 24 STATEMENT IS FOR INFORMATIONAL PURPOSES ONLY, AS THIS DEBT MAY HAVE
 25 BEEN INCLUDED IN A BANKRUPTCY ACTION, OR MAY HAVE BEEN DISCHARGED,
 26 THIS IS NOT AN ATTEMPT TO COLLECT, RECOVER OR OFFSET THE MORTGAGE
 27 INDEBTEDNESS AGAINST YOU PERSONALLY."

28

1 The fact that the statements included an "amount due," "due date," does not diminish the
2 effect of the prominent, clear, and broadly worded disclaimer. Notably, section 524 allows for a
3 debtor to pay back a discharged debt voluntarily. Under 11 U.S.C. § 524(f), "[n]othing contained in
4 subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt." Debtor
5 had the option to repay the amount due under the Confirmed Plan and thereby retain the Property
6 because Citi had not completed a foreclosure on the Property. If we accepted Debtor's argument that
7 the informational statements were unlawful debt collection under § 524, there would be little
8 daylight between (1) a legitimate attempt by Citi to inform Debtor how she could retain the Property
9 and (2) an unlawful attempt at debt collection in violation of the § 524 injunction. Instead, the
10 statutory scheme clearly allows for Citi to send potentially helpful informational statements to the
11 Debtor without simultaneously casting those statements as debt collection. In light of these facts, the
12 informational statements sent by Citi were not designed to have the "objective effect" of
13 "pressur[ing] the debtor to pay a discharged debt," in violation of § 524. While subsequent statements
14 included different disclaimers, each statement properly advised the Debtor of the informational
15 nature of the correspondence and made it clear the statements were not an attempt to collect a debt
16 from the Debtor personally. Accordingly, Citi asserts the informational statements were reasonable
17 given the Debtor's default under the Plan. Citi did not believe the statements violated the discharge
18 injunction, automatic stay, or any other provision of the Bankruptcy Code. Thus, Citi asserts its
19 actions were objectively reasonable.

20 Third, the terms of the Confirmed Plan required ongoing payments post-discharge. As
21 discussed above, the Debtor defaulted on payments under the Confirmed Plan. Accordingly, it was
22 objectively reasonable for Citi to send correspondence to the Debtor with offers of assistance and
23 options for loss mitigation. Further, Citi asserts said communications were in furtherance of the
24 enforcement of its *in rem* rights based on the *Debtor's* failure to make payments under the Confirmed
25 Plan, not in furtherance of an attempt to collect a discharged debt from the Debtor personally (as
26 clearly disclosed on each statement). Enforcement of a lien is not a violation of the discharge
27 injunction because the discharge injunction by its terms only prohibits efforts to collect debts "as a
28 personal liability of the debtor." § 524. *See, e.g., Marino*, 577 B.R. 772, 784.

1 While the Debtor may argue said statements contained inaccurate figures, the Subject Loan
 2 still reflected a default based on the Debtor's failure to make payments. Thus, it was objectively
 3 reasonable for Citi to send monthly statements to the Debtor regarding the account status. As the
 4 party seeking contempt sanctions, the Debtor has the burden of proof to show by "clear and
 5 convincing" evidence that Citi acted unreasonably given her default under the Plan. *FTC v.*
 6 *Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). Debtor has failed to meet her burden.

7 Based on the foregoing, Citi did not knowingly and willfully violate the discharge injunction
 8 or automatic stay. Citi had an objectively reasonable belief the automatic stay was no longer in effect,
 9 the communications were proper in accordance with the Debtor's Plan and ongoing relationship
 10 amongst the parties, and the informational statements were proper and necessary to enforce its *in*
 11 *rem* rights and/or provide the Debtor with potential loss mitigation options based on her default
 12 under the terms of the Confirmed Plan. Citi is informed and believes it is currently in compliance
 13 with all court orders. As a consequence, Citi did not knowingly violate the discharge injunction or
 14 intend its actions to violate said injunction. Accordingly, damages are inappropriate under 11 U.S.C.
 15 §§ 524 or 105(a).

16

17 **3. Debtor Has Failed to Demonstrate She Suffered Damages or that
 Citi Caused Said Damages**

18 Assuming *arguendo* Debtor could satisfy the elements for a willful violation of the discharge
 19 injunction under section 524 or that the Court finds Citi in contempt under § 105(a), Debtor has
 20 failed to establish she is entitled to any damages. The Debtor's Motion for Contempt does not detail
 21 or quantify the damages suffered beyond the attorneys' fees incurred to bring the instant Motion for
 22 Contempt, and a statement she suffered emotional stress and time/gas driving to her attorneys' office.

23

a. Actual Damages

24 Compensatory damages are recoverable by a debtor for a creditor's violation under a § 105(a)
 25 civil contempt motion. *See In re Dyer*, 322 F.3d at 1193 (Citing *Walls v. Wells Fargo Bank, N.A.*,
 26 276 F.3d 502,507 (9th Cir.2002)). Further, "compensatory damages" include those damages that are
 27 "sufficient in amount to indemnify the injured person for the loss suffered," essentially placing the
 28 injured party in as good a position as it would have been in absent violation. *See* Black's Law

1 Dictionary 445 (9th ed.2009). However, in order to recover such damages, the party asserting
 2 compensatory damages must specifically prove not only the right to damages, but also the amount
 3 of damages. In proving compensatory damages, the existence and amount of damages must be based
 4 upon more than mere conjecture. See *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251
 5 F.3d 814, 824 (9th Cir.2001); *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 361 (9th Cir.1996); *In*
 6 *re 1601 W. Sunnyside Dr. #106, LLC*, 2010 WL 5481080, at *6 (Bankr. D. Idaho Dec. 30, 2010).

7 Debtor failed to quantify what damages she suffered beyond alleging she incurred attorneys'
 8 fees to bring the instant Motion for Contempt, and a statement she suffered emotional distress.
 9 Further, Debtor stated she spent money on gas, copies, and time going to her attorney's office in the
 10 sum of \$150. However, in order to recover such damages, the party asserting compensatory damages
 11 must specifically prove not only the right to damages, but also the amount of damages. In proving
 12 compensatory damages, the existence and amount of damages must be based upon more than mere
 13 conjecture. Accordingly, the Debtor's request for "actual" damages must be denied.

14 b. Emotional Damages:

15 Debtor asserts she suffered emotional distress over the accounting issues discussed above.
 16 However, Citi contends Debtor failed to meet her burden she is entitled compensatory damages for
 17 emotional distress. See, *Dawson v. Washington Mutual Bank (In re Dawson)*, 390 F.3d 1139, 1148
 18 (9th Cir. 2004) (individual must prove: 1) suffer significant harm; 2) clearly establish the significant
 19 harm; and 3) demonstrate a causal connection between that significant harm and violation of the
 20 automatic stay (as distinct from, for instance, the anxiety and pressures inherent in the bankruptcy
 21 process).

22 The only assertion of emotional distress includes Debtor's assertion of "emotional and
 23 financial strain." (See Debtor Declaration, ¶25). This does not sufficiently prove Debtor suffered
 24 significant harm. Further, Debtor failed to provide sufficient evidence of a causal connection
 25 between the asserted distress and any alleged violation by Citi. Thus, Citi asserts Debtor is not
 26 entitled to damages for emotional distress as an element of compensatory damages.

27 /./

28 /./

1 c. Attorneys' Fees and Costs

2 Section 105(a) authorizes only such remedies as are “necessary or appropriate to carry out
 3 the provisions of this title.” “[C]ivil contempt is the normal sanction for violation of the discharge
 4 injunction.” 4 *Collier on Bankruptcy* ¶ 524.02[2][c] (15th ed. 1999). Compensatory civil contempt
 5 allows an aggrieved debtor to obtain compensatory damages, including attorneys’ fees. *Walls v.*
 6 *Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). Courts have applied the standard of §
 7 330 for compensating professionals in bankruptcy, which provides for “reasonable compensation
 8 for actual, necessary services.” 11 U.S.C. § 330(a)(1)(A). See *United States v. Price*, 176 B.R. 807,
 9 808 (N.D.Ill.1993), *aff’d*, 42 F.3d 1068 (7th Cir.1994) (“To the extent that services performed are
 10 compensable under § 330, attorneys’ fees have been incurred by the estate and can be awarded
 11 pursuant to § 362(h).”); *Sucre v. MIC Leasing Corp. (In re Sucre)*, 226 B.R. 340, 351
 12 (Bankr.S.D.N.Y.1998).

13 Courts especially scrutinize cases where the debtor’s only injuries are those incurred in
 14 litigating the motion for sanctions, and where there exist no circumstances warranting punitive
 15 damages. See *McHenry*, 179 B.R. at 168; *Shadduck v. Rodolakis*, 221 B.R. 573, 585 (D.Mass.1998)
 16 (requiring a debtor to attempt to resolve the dispute prior to filing a motion for sanctions); *In re*
 17 *Craine*, 206 B.R. 594 (Bankr.M.D.Fla.1997) (finding no injury); *In re Brock Utils. & Grading, Inc.*,
 18 185 B.R. 719 (Bankr.E.D.N.C.1995) (same); *McLaughlin*, 96 B.R. at 563 (reducing fees). *In re*
 19 *Roman*, 283 B.R. 1, 12 (B.A.P. 9th Cir. 2002). When considering damages, the court must consider
 20 two factors: “(1) what expenses or costs resulted from the violation and (2) what portion of those
 21 costs was reasonable, as opposed to costs that could have been mitigated.” *In re Roman*, 283 B.R. 1,
 22 12 (9th Cir. BAP 2002). Further, any such attorneys’ fees must be reasonable. See, *Perry v. O-*
 23 *Donnell*, 759 F.2d 702, 706 (9th Cir. 1985).

24 Here, Debtor failed to plead the amount of attorneys’ fees incurred in prosecuting the instant
 25 Motion for Contempt against Citi. Rather, the Motion for Contempt simply requests an award of
 26 attorneys’ fees and costs incurred by Debtor for filing the instant Motion for Contempt for an amount
 27 to be determined at a hearing. As discussed above, Citi verified completion of system adjustments
 28 prior to the filing of the Motion for Contempt as evidenced by the monthly statements sent to the

1 Debtor for the last twelve (12) months and the Amended Proof of Claim filed in the Third Case. Citi
2 believes Debtor failed to provide ***clear and convincing evidence*** of a discharge violation, Plan
3 violation, or stay violation to warrant a finding of damages.

4 Moreover, Citi disputes whether any such attorneys' fees and costs incurred in filing the
5 Motion for Contempt are reasonable given Citi's compliance with the Confirmation Order at the
6 time of filing and the currently scheduled Judicial Settlement Conference to resolve all issues
7 involving the Subject Loan. As a result, Citi asserts Debtor failed to mitigate damages and is not
8 appearing in this Court with clean hands. Finally, Citi opposes an award of any attorneys' fees and
9 costs for any professionals who have yet to be approved via an Employment Application in *this*
10 Bankruptcy Case. As such, Debtor's request for attorneys' fees and costs must be denied.

11 **4. Debtor Failed to Mitigate Damages**

12 The ongoing dispute between the Parties has encompassed three (3) bankruptcy cases
13 spanning a decade and multiple service transfers of the Debtor's loan(s) over ten (10) years. Upon
14 the filing of the Third Case, Citi immediately contacted Debtor's counsel in an attempt to resolve
15 the default on the Subject Loan and any outstanding compliance issues related to the First Case.
16 However, Debtor failed to respond to Citi's efforts. After continued litigation and little progress
17 towards confirmation in the Third Case, on April 7, 2020, Citi met and conferred with Debtor's
18 counsel regarding the possibility of a global settlement of all claims, including mutual participation
19 in the court's judicial settlement program. Thereafter, Citi filed a Motion Requesting a Judicial
20 Settlement Conference. Subsequently, the Court entered scheduling orders, with a Judicial
21 Settlement Conference scheduled for October 6, 2020.

22 Notwithstanding the scheduled Judicial Settlement Conference in the Third Case, Debtor
23 elected to file the instant Motion for Contempt in the First Case on September 4, 2020. Citi asserts
24 the filing of the Motion for Contempt was unnecessary due to the scheduled Judicial Settlement
25 Conference. Further, the filing of the Motion for Contempt was unreasonable given Citi's
26 compliance with the Confirmation Order at the time of filing, the Debtor's default under the Plan,
27 the termination of the automatic stay years ago, and the currently scheduled Judicial Settlement
28

1 Conference to resolve all issues involving the Subject Loan. Accordingly, Citi asserts the Debtor
2 failed to mitigate damages and any request for damages must be denied.

3 **5. Punitive Damages are Not Appropriate in this Case**

4 Similar to her claims for compensatory damages and attorney's fees, Debtor's request for
5 punitive damages is unavailing. While section 362(k) authorizes an award of punitive damages in
6 appropriate circumstances, *see 11 U.S.C. § 362(k)(1)*, a bankruptcy court is not generally authorized
7 to impose punitive sanctions under the contempt authority of section 105(a). *See Dyer*, 322 F.3d at
8 1194; *see also In re Roman*, 283 B.R. 1, 14 (9th Cir. BAP 2002). Even if punitive sanctions were
9 authorized by section 105(a), Debtor would still not be entitled to such an award. Put simply, punitive
10 damages are not warranted where a claimant, like Debtor, has failed to establish a right to recover
11 actual damages. *See e.g., In re McHenry*, 179 B.R. 165, 168 (9th Cir. BAP 1995)(noting that punitive
12 damages should not be awarded in the absence of actual damages). There is otherwise no evidence
13 that Citi acted with a reckless or callous disregard for Debtor's rights, a necessary prerequisite to
14 recovering punitive damages. *See e.g., In re Bloom*, 875 F.2d at 228. Debtors has failed to prove that
15 Citi acted deliberately, maliciously, or in bad faith. Based on the foregoing, Debtor's request for
16 punitive damages must be denied.

17 **IV. CONCLUSION**

18 Based on above, Debtor's claims for violation of the automatic stay, violation of the
19 discharge injunction and contempt are unwarranted. Citi acted objectively reasonably by sending
20 informational statements to the Debtor following her default under the Confirmed Plan. Citi updated
21 its system to reflect the terms of the Confirmed Plan well before the filing of the instant Motion for
22 Contempt. If any party is *currently* in violation of the Confirmed Plan, it is the Debtor, not Citi.
23 Debtor failed to make all required payments under the Confirmed Plan and subsequently filed
24 numerous bankruptcy cases through her shell entities (while continuing to collect rental income).
25 Although the Court scheduled a Judicial Settlement Conference, the Debtor filed the instant Motion
26 for Contempt. Debtor failed to mitigate damages and is not appearing before the Court with clean
27 hands. Debtor failed to demonstrate she is entitled to damages or prove said damages are directly
28 attributable to any action or inaction of Citi, or that sanctions are necessary or appropriate.

Based upon the foregoing, Citi respectfully request the Court to deny the Debtor's Motion for Contempt. In the alternative, Citi requests a stay of any proceedings on the Motion for Contempt until after the conclusion of the Judicial Settlement Conference in the First Case. In the alternative, that the Court order the Parties to participate in a Judicial Settlement Conference in this Bankruptcy Case (the First Case). In the alternative, Citi requests an evidentiary hearing and scheduling order to conduct discovery in this case and potentially file a dispositive motion regarding whether Debtor has met her burden of proof for the alleged violations and/or damages.

WHEREFORE: Citi respectfully requests that:

1. The Court enter an Order Denying the Motion for Contempt;
 2. In the alternative, the Court stay any proceedings on the Motion for Contempt until after the conclusion of the Judicial Settlement Conference in the First Case;
 3. In the alternative, the Court order the Parties to participate in a Judicial Settlement Conference in this Bankruptcy Case (the First Case);
 4. In the alternative, the Court issue a scheduling order regarding deadlines to complete discovery and file dispositive motions with an evidentiary hearing to be set (if necessary);
 5. The Court award Citi reasonable attorney's fees and costs; and
 6. Any additional relief the Court deems appropriate.

Respectfully submitted:

ALDRIDGE PITE, LLP

Dated: October 2, 2020

/s/ Eddie R. Jimenez
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